

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: PROTEST

DISMISSAL

THE CITADEL  
GUARANTEED ENERGY  
SAVINGS CONTRACT—  
STATE PROJECT H09-N072-BC)

POSTING DATE: JUNE 6, 2007

AMERESCO

vs.

THE CITADEL

This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from AMERESCO under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on a guaranteed energy savings project for the Citadel. Pursuant to S.C. Code Ann. §11-35-4210(3) (Supp. 2006), the CPOC conducted an administrative review. This decision is based on that review and the applicable law and precedents.

### **NATURE OF THE PROTEST**

On July 13, 2006, the Citadel issued a revised Request for Proposals ("RFP") seeking comprehensive energy and operational related capital improvement services designed to identify and implement energy savings measures for the Citadel's facilities. The Citadel sent the RFP only to the three companies selected during an earlier Request for Qualifications process as the best qualified to perform the work. Those three companies were AMERESCO, Siemens, and Johnson Controls.

In response to the RFP, all three companies submitted comprehensive proposals detailing how each of them would conduct an energy audit of the Citadel's facilities. After evaluating the three proposals, and interviewing the three vendors on January 5, 2007, the Citadel's evaluation committee gave AMERESCO's proposal the highest rank of the three and recommended the Citadel award a contract to AMERESCO. The Citadel staff also notified the three offerors of the evaluation committee's recommendation via e-mail.

On April 21, 2007, the Citadel's Board of Visitors passed a resolution directing the Citadel to revise the scope of the RFP and provide the three offerors the opportunity to submit their best and final offers. On or about April 27, 2007, after receiving telephone calls from AMERESCO and Siemens enquiring about the actions of the Board of Visitors, the Citadel's attorney e-mailed both companies the language of the Board's resolution. On May 7, 2007, AMERESCO filed this protest objecting to the use of the best and final offer process on this project. A copy of AMERESCO's protest is attached as Exhibit A.

On May 14, 2007, the Citadel formally notified the three offerors of the actions of the Board of Visitor's. A copy of the Citadel's letter is attached as Exhibit B. The Citadel's notice advises all offerors that while the Citadel was revising the scope of the request for proposals to ask for best and final offers, AMERESCO filed a protest with the CPOC. The Citadel further advises the three offerors that they will not proceed with any further steps on the project pending the CPOC's action on the protest.

### **CPOC FINDINGS**

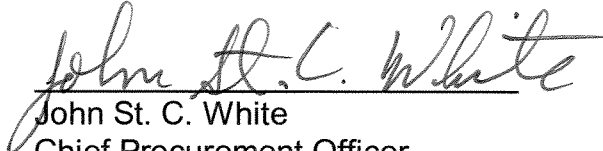
AMERESCO'S letter of protest states that it "files this protest now, prior to completion of the 'best and final' process, in order to preserve its rights to object to the invalid 'best and final' process and in order not to waive its rights to object if it is forced to participate in the improper process." Not only has AMERESCO filed this protest prior to the completion of the "best and final" process, it has

filed this protest prior to either an award or the issuance of a solicitation amendment. SC Code Ann. § 11-35-4210 (Supp. 2006) creates the right to protest both solicitations and awards. The right to protest attaches only to one of these two actions. Here, AMERESCO has protested prior to the Citadel issuing any amendment to the RFP or posting an award. Accordingly, the protest is premature.

### **DECISION**

It is the decision of the Chief Procurement Officer for Construction that the protest of AMERESCO protests an event that has not yet occurred and is, pursuant to SC Code Ann. § 11-35-4210 (Supp. 2006), premature. Therefore, the CPOC has no choice but to dismiss AMERESCO's protest. This decision does not in any way prejudice AMERESCO's rights under Section 11-35-4210.

For the foregoing reasons, Protest Dismissed.

  
John St. C. White  
Chief Procurement Officer  
For Construction

6 June 07  
Date

Columbia, South Carolina

## STATEMENT OF THE RIGHT TO APPEAL

### **STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

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Additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at [www.state.sc.us/mmo/legal/paneldec.htm](http://www.state.sc.us/mmo/legal/paneldec.htm)

**PARKER POE**

PARKER POE ADAMS &amp; BERNSTEIN LLP

Attorneys and Counselors at Law

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May 7, 2007

VIA HAND DELIVERY

Mr. John St. C. White, PE  
State Engineer and Chief Procurement Officer for Construction  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

Re: Request for Proposal – The Citadel  
Energy Performance Contract June 1, 2006 (Revised July 13, 2006)

Dear Mr. White :

Pursuant to S.C.Code Ann. § 11-35-4210 (1986, as amended) and S.C. Constitution Art. I, § 22, AMERESCO hereby protests the actions of The Citadel with regard to the above-referenced solicitation as follows:

Background

On July 13, 2006, The Citadel issued revised Request for Proposals (“RFP”) seeking comprehensive energy and operational related capital improvement services designed to identify and, potentially, implement energy savings measures for The Citadel’s facilities on its Charleston, South Carolina campus. The RFP was sent only to the three companies selected during an earlier Request for Qualifications process as the best qualified to perform the work. Those three companies were AMERESCO, Siemens, and Johnson Controls.

The RFP required each offeror to submit a comprehensive proposal detailing how that particular offeror would conduct a complete energy audit of The Citadel’s facilities to include lighting, envelope, mechanical equipment, steam and condensate, plumbing, water conservation, energy management systems and controls. Each offeror was required to state a firm price for the Energy Efficiency Measures proposed by the offeror and to state a guaranteed total cumulative savings to The Citadel if the measures were implemented. Under the RFP, the winning vendor would first perform a Detailed Energy Study and, then, if The Citadel determined to go forward, would continue with the construction/installation phase of the project.

CHARLESTON, SC  
CHARLOTTE, NC  
MYRTLE BEACH, SC  
RALEIGH, NC  
SPARTANBURG, SC

John St. C. White, PE  
May 7, 2007  
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As provided in the RFP, in November 2006, AMERESCO submitted a comprehensive proposal, including a detailed description of how the project would be completed, a fixed price for providing the Energy Efficiency Measures, and a guaranteed savings amount to The Citadel if the energy savings measures were implemented. AMERESCO also participated in the evaluation process by presenting its proposal to the designated selection committee.

After thorough evaluation of the proposals and after interviewing the vendors, on Friday, January 5, 2007, The Citadel notified all three vendors via electronic mail that the evaluation committee had selected AMERESCO as the vendor whose proposal was deemed most advantageous to The Citadel. In the email, The Citadel informed AMERESCO and the other vendors that official written notice would be sent to AMERESCO on the following Monday.

Despite its good faith participation in the RFP process and despite its legitimate selection as the winning vendor, AMERESCO was never sent the official notice promised. Instead, on information and belief, as a result of lobbying efforts by an unsuccessful vendor, The Citadel Board decided to override the comprehensive evaluation of the selection committee and to direct a "re-evaluation" of the proposals under the guise of S.C.Code Ann. § 11-35-1530(8), which allows a procuring agency to change the scope of a procurement and request "best and final offers" from participating vendors.

Thus, as AMERESCO was informed on April 27, 2007, by the General Counsel for The Citadel, the Board of Visitors passed a resolution as follows: "The Board of Visitors directs the administration to revise the scope of the energy services request for proposals, and provide all three offerors the opportunity to submit their best and final offers." On information and belief, the decision to revise the scope of the request for proposals is not based on any rational or reasonable or even articulated reason but rather is an improper attempt to change the outcome reached through the legitimate procurement process.

#### Grounds for Relief

1. AMERESCO is aware that, under S.C.Code Ann. § 11-35-1530(8) a legitimate decision to revise the scope of an RFP is not protestable, however, AMERESCO files this protest now, prior to completion of the "best and final" process, in order to preserve its rights to object to the invalid "best and final" process and in order not to waive its rights to object if it is forced to participate in the improper process.

In that regard, AMERESCO states as a grounds of protest that the decision of The Citadel Board of Visitors to revise the scope of the RFP in question is not based on any legitimate or rational or reasonable reason and, therefore, is not a valid action under S.C.Code Ann. § 11-35-1530(8). Further, the actions of The Citadel in this case are in violation of the stated purposes of the Consolidated Procurement Code, S.C.Code Ann. § 11-35-20, particularly subparagraphs (a), (b), (f), and (g), and of the obligation of the State to negotiate in good faith under S.C.Code Ann.

PARKER POE ADAMS & BERNSTEIN, LLP

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May 7, 2007  
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§ 11-35-30. Finally, the decision to revise the scope of the RFP in this case is arbitrary and capricious and in violation of the Due Process clauses of the South Carolina and United States Constitutions.

2. To the extent that The Citadel attempts to utilize any of AMERESCO's proprietary detailed energy savings plan or other work product in The Citadel's revisions in order to seek "best and final" offers from competing vendors, AMERESCO objects and asserts that such action would be in violation of S.C.Code Ann. § 11-35-1530(8), S.C.Code Ann. § 11-35-20(a), (b), (f), and (g), S.C.Code Ann. § 11-35-30, and the Due Process clauses of the South Carolina and United States Constitutions.

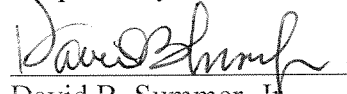
3. AMERESCO reserves the right to amend or supplement this protest at such time as The Citadel reveals the specific details of the revisions in the scope of the RFP.

4. AMERESCO reserves the right to amend or supplement this protest at such time as the results of the invalid best and final process are revealed.

Relief Requested

For the reasons stated above, AMERESCO requests that the attempt by The Citadel to revise the scope of the RFP in question be declared invalid and that The Citadel be directed to proceed with award of the contract to AMERESCO as the offeror whose proposal has been deemed to be the most advantageous to the State.

Respectfully submitted,



David B. Summer, Jr.

Faye A. Flowers

PARKER POE ADAMS & BERNSTEIN, LLP

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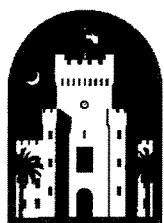
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# THE CITADEL

THE MILITARY COLLEGE OF SOUTH CAROLINA

EXH. B

Office of the General Counsel

May 14, 2007

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Re: State Project #H09-N072-BC  
Energy Services Project

Gentlemen:

The purpose of this letter is to advise you of developments in State Project #H09-N072-BC, The Citadel's Request for Proposals for an Energy Services Contract. As you know, on June 26, 2006, The Citadel issued a Request for Proposal to each of your companies. According to that document, The Citadel sought an Energy Services Company to perform a Detailed Energy Study, which study could lead to an Energy Performance Contract. The Citadel subsequently issued four Addenda to that RFP.

During December of 2006, The Citadel received Preliminary Energy Studies from each of your companies. On January 5, 2007, The Citadel's selection committee heard presentations from the three of you. After the meeting, the selection committee unanimously ranked Ameresco first, Siemens second, and Johnson Controls third. John Gardner, The Citadel's Resident Architect, subsequently informed all three of you of the selection committee's decision.



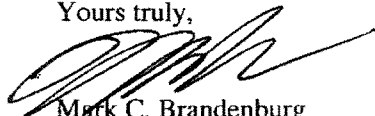
On Saturday, April 21, 2007, The Citadel's Board of Visitors, the governing board of the school, directed that the scope of the Request for Proposal for the Energy Performance Contract be revised, and that all offerors should be provided the opportunity to present their best and final offer. The complete text of the resolution approved by the Board is as follows: *That the Board of Visitors directs the administration to revise the scope of the energy services request for proposals, and provide all three offerors the opportunity to submit their best and final offers.* Representatives of Ameresco and Siemens contacted the school during the week following the Board of Visitors meeting, and I sent this language to those representatives by e-mail. No representative of Johnson Controls contacted the college, however. Therefore, the first purpose of this letter is to formally alert all three companies of the Board's directive.

While the school was drafting the revised scope of the request for proposals, Ameresco filed a letter of protest with the state engineer. Pursuant to the State Engineer's Manual, Section 1.15 D.1, "the agency may not proceed with the procurement or enter into a contract until the protest has been finally resolved." Therefore, The Citadel now awaits the state engineer's action on Ameresco's protest. However, in light of the school's notification to all of you of the Board's directive, I thought it wise to alert you of the protest as well.

Please do not hesitate to contact me if you have any questions concerning this information.

With best regards, I am,

Yours truly,



Mark C. Brandenburg  
General Counsel

MCB:jhs

cc: Major General Arthur H. Baiden, III, AUS (Ret.)  
Lieutenant General John W. Rosa, USAF (Ret.)